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**McElroy Coal Company and United Mine Workers of America Local Union 1638, AFL-CIO, CLC.**  
Case 6-CA-35806

March 9, 2009

**DECISION AND ORDER**

BY CHAIRMAN LIEBMAN AND MEMBER SCHAMBER

On November 21, 2008, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions,<sup>1</sup> and the General Counsel and the Charging Party filed separate answering briefs. The General Counsel also filed limited exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, limited exceptions, and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order as modified.<sup>3</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, McElroy Coal Company, Glen Easton, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Restricting employees by threatening them with having their vehicles towed from its parking lot because

<sup>1</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, limited exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

We shall modify par. 1(a) of the judge's recommended Order to clarify his unfair labor practice findings. We shall also substitute a new notice in conformity with the recommended Order as modified.

employees engaged in the protected activity of displaying signs stating 'We Don't Want Scabs' on those vehicles in support of the United Mine Workers of America, Local 1638, AFL-CIO, CLC's position on subcontracting."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. March 9, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

**APPENDIX**

**NOTICE TO EMPLOYEES**

**POSTED BY ORDER OF THE**

**NATIONAL LABOR RELATIONS BOARD**

**An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL not restrict employees by threatening them with having their vehicles towed from our parking lot because employees engage in the protected activity of displaying signs stating "We Don't Want Scabs" on those vehicles in support of the United Mine Workers of America, Local 1638, AFL-CIO, CLC's position on subcontracting.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

**MCELROY COAL COMPANY**

*Suzanne Burnett, Esq.*, for the General Counsel.

*Thomas H. May, Esq.*, of Pittsburgh, Pennsylvania, for the Respondent.

*Deborah J. Gaydos, Esq.*, of Fairfax, Virginia, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania on October 15, 2008. The initial charge was filed on October 26, 2007, and the amended charge was filed on May 28, 2008.<sup>1</sup> The charge was filed by the United Mine Workers of America International Union (UMW) and the amended charge was filed by United Mine Workers of America, Local Union 1638, AFL-CIO, CLC (the Union or Local 1638). The amended charge was filed against McElroy Coal Company (Respondent).<sup>2</sup> The complaint alleges the Respondent violated Section 8(a)(1) of the Act by threatening employees that it would have their vehicles towed from the parking lot if they displayed signs in support of the Union's position on subcontracting.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the oral arguments by the General Counsel, the Union, and the Respondent, I make the following<sup>3</sup>

## FINDINGS OF FACT

## I. JURISDICTION

Respondent, a corporation, with an office and place of business in Glen Easton, West Virginia, has been engaged in the business of operating an underground coal mine. During the 12 month period ending September 30, Respondent purchased and received at its West Virginia facility goods valued in excess of \$50,000 directly from points located outside of the state. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

The mine operates continuously on three shifts. The Union represents the Employer's production and maintenance employees. Terry Lewis was employed by Respondent as a belt cleaner. At the time of the trial, Lewis had been president of the Union for about 4-1/2 months. He had been a member of the member of the mine committee for about 5 years. The mine committee is a grievance committee. The committee members are akin to stewards.

Lewis testified that subcontracting has always been an issue between the Union and the Respondent. However, the dispute between the parties has increased in 2007, due to Respondent's

increased use of subcontractors. Lewis testified there always had been contractors on the mine surface and some at one of the portals, but they had never seen contractors underground. Lewis testified around June or July, there started to be an influx of contractors underground. Lewis testified that over the years there had been many grievances on subcontracting. He testified most cases were settled. Lewis testified the willingness to settle grievances changed right after vacation time, the first and second week of July, in 2007. Lewis testified there was an influx of contractors they had not seen before "and they were doing work that we always done."

Lewis estimated that during January 2 to October 1, there were about 150 grievances filed over subcontracting. Subcontracting was discussed at a lot of union meetings. The subcontracting provision in the applicable collective bargaining agreement provides that repair and maintenance work customarily performed by classified employees at the mine or central shop shall not be contracted out except where the work is performed by a manufacturer or supplier under warranty or where the employer does not have available equipment or regular employees, including laid off employees, with the necessary skills to perform the work. Lewis testified that, during the time period of January to September 2007, seven cases went to arbitration over subcontracting, and the Employer prevailed in almost all of them. Lewis could not state how many grievances were settled short of arbitration. Lewis testified most of the arbitrations were in the latter part of 2007. Lewis testified the Union has filed grievances since the arbitrations that have been settled. He testified they had settled a grievance as recently as the Wednesday before the trial herein. He testified the Employer paid as a result of the settlement.

Clifford White has been employed by Respondent since 2003. In September, White was a belt man, and at the time of the trial he was a rock duster. White holds union office as a mine committeeman, organizer, and alternate safety person. He has held those positions since June 2007. White testified there was a dispute between the Union and Respondent over subcontractor GMS putting in belt rollers, shoveling belts, setting posts, hanging life line, and water line. White first saw the subcontractor performing this work around April or May, and the amount of the work GMS was performing increased in September. White testified grievances were filed over this work.

White testified that, as a belt man, White traveled through the mine which contained about 26 miles of belt enabling White to see subcontractors perform the disputed work. White testified the amount of subcontracting was increasing all of the time. White testified he spoke to Assistant Belt Coordinator Chuck Davis about the increase in the use of subcontractors around June. White was a committeeman at the time of the conversation with Davis which took place in the office in the presence of Belt Coordinator Denny Reynolds. White testified Davis and Reynolds are supervisors and not members of the bargaining unit. White testified Davis told White, referring to the subcontractors, you might as well get used to it because they are going to be here for a good while to come. White testified bargaining unit employees did the work of shoveling the belt. It was done by belt shovelers and general inside laborers. He testified bargaining unit pipe men or laborers hang water

<sup>1</sup> All dates are 2007 unless otherwise specified.

<sup>2</sup> The initial charge listed the Employer as Consol Energy, McElroy Coal Company, McElroy Mine. However, the amended charge only lists McElroy Coal Company as the Employer, and McElroy Coal Company is the only named Respondent in the General Counsel's complaint.

<sup>3</sup> In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), reversed on other grounds 340 U.S. 474 (1951). Further discussions of the witnesses' testimony and credibility are set forth herein.

lines.

White testified there are about 737 employees in the bargaining unit, working three rotating shifts. The contractors were performing work on all shifts. White estimated that about 145 people in the bargaining unit performed the disputed work per shift, with a little more on the day shift. White estimated that about 22 or 23 contractor employees were coming in and doing the work per day at one portal. White did not know the number of subcontractor employees, if any, at the other two portals.

White testified there have been disagreements between the Union and the Respondent concerning the application of the collective bargaining agreement's subcontracting clause. White testified the grievance on subcontracting pertaining to the belt structure was the only case he knew about that went to arbitration. White testified all of the other cases settled. He testified, "They settled setting posts and settled shoveling belt." White testified the Employer paid the bargaining unit employees backpay as part of the settlement for those grievances. White testified that "each grievance that I wrote, I put cease and desist. I could not understand why they pay but not cease and desist." White testified the Respondent, as part of the grievance settlement, paid the bargaining unit employees, but continued to use subcontractors although White had placed cease-and-desist language in the grievances.

Lewis testified the Union has a meeting every third Sunday of the month. Therefore, the September meeting was held on September 16. Lewis testified that, during the September meeting, there was a discussion about sending management a message that they did not want subcontractors. Lewis testified then Local President Roger Sparks suggested they place signs on their vehicles to protest the subcontractors' presence at the mine. Lewis testified some of the meetings participants talked about using language such as, "We don't want scabs; leave scabs; UMW only." There were about 35 to 40 employees present for the meeting. Lewis testified they discussed the meaning of the word scab at the meeting, and different people had different definitions. Lewis testified it was discussed that the subcontractors' employees were nonunion workers on the mine site performing bargaining unit work. It was discussed, "Why do we have to pay union dues? We belong to a union to work at this mine and they don't have to pay union dues, but they could work beside us at our coal mine." Lewis testified that was the discussion as to the meaning of the term scab.<sup>4</sup> White testified that, during the meeting, there was a plan to protest the use of subcontractors by placing signs on employees' trucks as they were parked in Respondent's parking lot. White testified there was a discussion that the signs would say, "We don't want scabs."<sup>5</sup>

<sup>4</sup> Lewis testified his own definition of scab was someone who crossed a picket line and goes to work and takes another man's job, or refused to strike. Lewis testified different people have different interpretations, "and what the interpretation that came down from that union meeting didn't necessarily have to be my opinion."

<sup>5</sup> John Mercer has been employed by the Employer for 30 years. Mercer's job classification is pipe man. He is the financial secretary for the local and is on the mine and safety committee. Mercer testified he attended the September union meeting where the subject of making signs to protest subcontracting was raised. He testified, "we mainly

On September 27, Sparks signed two separate protest complaints over subcontracting addressed to Human Resources Supervisor Jason Adkins. One was over shoveling, setting timbers, and labor work, and the other over changing belt rollers. Sparks made an information request to Adkins relating to subcontracting by letter dated the same date. Adkins responded by letter dated October 16, acknowledging receipt of both letters of protest concerning the contracting out of work on September 28, and directing the employees to file a grievance.

White testified he had signs made for his truck. The signs stated, "WE DON'T WANT SCABS." The signs were two feet by eight feet on a sheet of plywood painted white with blue letters. There was one sign on each side of the bed of White's full size pick up truck. The signs were the length of the truck bed. White called Sparks to let him know the signs were finished. White was the only employee to place protest signs on his vehicle.

White testified he drove the truck to work with the signs on September 27, 28 and October 1. White testified he worked the afternoon shift on September 27. White arrived at the parking lot at about 2 p.m. and parked 50 feet from the main entrance to where the coal miners get ready for work. White testified employees asked him about the sign. He testified he knew Adkins saw the sign because Adkins walked by White. White testified Rich Eddy from the UMW was there and he and White were talking at the time. White testified Adkins walked by White and went right up to the truck. Adkins put his hands on his hips, stood there looked at the truck for a while, and then walked back in the office. Adkins did not say anything. White worked the afternoon shift on September 28. He parked toward the back end of the parking lot that day, about 200 feet from the mine entrance. The next shift White worked was October 1. He testified he parked that day towards the main entrance where the miners drive by.<sup>6</sup>

White testified, "My definition of a scab is it's a union coal mine; it should be union work." White testified he knew the

discussed about making some type of sign to protest the non-union people working there." Mercer testified Sparks suggested signs should be made. Shane Van Scyoc has been employed by the Employer for three years as a steady midnight brattice man. Van Scyoc holds union office, including union committeeman. He did not attend the September union meeting. Van Scyoc was aware the union was taking issue in mid 2007 with an increase in the use of subcontractors in the mine. He testified the Employer "had more contractors in the mine than usual." He testified he has been at a union meeting where that was discussed. Van Scyoc testified that towards the middle of 2007, they had more contractors in changing rollers on the belts, belt shoveling, "and now, they are doing my job, as far as building walls—or overcasts."

<sup>6</sup> Lewis testified that as of October 1, 2007, Clifford White was the only employee to put a sign on his vehicle. Lewis saw the sign on White's vehicle. Lewis testified that White put the sign up around the first part of October. Lewis testified there was a lot of discussion about it among the employees, such as, "Did you see Cliff's truck?" Lewis testified, in reference to the sign, "I just saw it the one day." He did not recall the exact wording, but the intent was, "Go home, scabs. We don't want scabs." Lewis only saw one sign, but he only glanced at the truck quickly. Lewis testified that, at the time, the employees were only working day shift, which was 8 a.m. to 4 p.m., which would have been the time the truck was parked.

workers employed by the subcontractor were not in a union “Because we know what GMS is.”<sup>7</sup> White testified he thought the word “scab” would be safe. White testified he did not use the word scab to fire people up. He testified, “Nobody got fired up.” He stated, “Guarantee you, nobody got fired up, not even the contractor.” He testified no one was upset about the word. White testified he did not use the word to get people upset to take action. He testified, “There was no action being taken.”

White testified on October 1, he was asked to report to the office by Adkins. Some of White’s coworkers told him Adkins was looking for him because White’s truck had signs on them. White testified he went to Adkins office at the end of White’s shift on October 1. Lewis, a mine committeeman, accompanied White. White testified as follows: Adkins told White he wanted the signs removed from White’s truck. Adkins told White he had to remove the truck from the parking lot because of the signs. White said, “It’s a freedom of speech, ain’t it?” Adkins responded he did not care about that, he wanted the truck removed. White said, “You mean to tell me I can’t bring it back the next day?” Adkins said, “No. Take the signs off the truck, you can bring the truck back.” White responded, “Okay.” Adkins told White if he came back with the signs, the truck would be towed at White’s expense. White testified that ended the meeting. Lewis testified that when he came out of the mine from work, Lewis was told by different employees that White was looking for him. When Lewis found White, White told him he needed Lewis to go to the office with him. Lewis testified as follows about the meeting: Lewis testified Adkins stated to White in reference to White’s truck, “I want it off the property.” White asked why, and Adkins said, “Because of the sign.” White said, “I am just expressing a freedom of speech, and don’t I have a right to do that?” Adkins said, “No. This is a private parking lot and I want it off.” White asked if he could bring it back. Adkins responded, “As long as the signs are gone, you can bring it back.” Adkins said, “If I see it out there again with the signs on it, I will have it towed.” Lewis testified the only reason Adkins gave for the removal of the signs was it was private property and he wanted the vehicle removed. Lewis testified Adkins did not cite any rules to them, or state the signs caused turmoil at the mine.

White removed the signs, and has not put them back on his truck. He testified no other employees had put signs on their trucks since about sub contractors. White testified about 30 or more employees asked him why he took the signs off his truck and White told them Adkins, “said I had to have them off there or my truck would be towed at my expense.” Lewis testified employees asked him about White taking the signs off his truck. He testified, “Different guys said—well, they were curious what happened when we went in the office.” He testified he told them “Jason said he had to take the signs off or get the truck out of the parking lot.” Lewis testified it was “it was

pretty much the bath house topic as to what happened.” He testified, “I explained to them what happened and then it was over.”

The parties stipulated the parking lot is not visible from the road leading to the mine. White testified employees, management, employees of subcontractors, and people who bring materials in park in the lot. White testified there was no strike or picket line going on at the facility at the time he put the sign on his truck. The employees of the subcontractors were not crossing a picket line, or replacing a striker. White testified during the time that he saw the subcontracting increasing there were no mine workers on layoff. Lewis testified all of the employees working at that portal of the mine park in that parking lot. Lewis testified employees put signs on their vehicles at the mine, such as favorite teams, hunting logos, religious signs, and others. Lewis testified he is not aware of any rule against displaying the signs on the parking lot. Lewis testified he did not hear that White’s signs caused any disruption of work or hostility to the subcontractors.

Mercer testified he became aware that White had a sign on his truck, the day White got in trouble. Mercer testified, “I come to work one day and noticed his truck sitting in the parking lot and seen the sign. And then when I went in the building, a lot of guys were talking about the company telling Cliff to remove his truck or remove the sign.” Mercer testified he had planned on putting a sign on his vehicle, but did not “Because of the trouble that was raised over Cliff’s sign in his truck.” Mercer testified he had not actually made a sign. Van Scyoc testified he did not see the sign on White’s truck. However, he testified that White told him he had placed a sign on his truck and had taken it off because he was told to remove it or his vehicle would be towed. Van Scyoc testified what happened to White changed his plans to put a sign on his car stating, “I can’t afford to have my vehicle towed.” Van Scyoc testified he never got around to making a sign.

#### *A. The testimony of Respondent’s witnesses*

Adkins has been employed by Respondent as supervisor of human resources since January 2007. He has been employed by the Employer or another mine owned by its parent company since 2003. Adkins testified the name of Respondent’s parent company is Consol Energy, Inc., and that it is actually Consolidation Coal Company.

Adkins testified he first became aware of the sign on White’s truck on September 24. Adkins testified, “I heard through the hallways that Cliff had had a sign on his truck, so I went out and looked at it.” Adkins identified a photo he had taken of the truck, which he testified he took the same day he saw the sign. Adkins testified the truck was parked in the employee parking lot near the entrance to the building when Adkins took the picture. Adkins testified when he saw the sign, “I was alarmed,” because of the word “scab.” Adkins testified it is an inflammatory word that “means somebody that is crossing the picket line or somebody that is replacing a worker that is on strike. Adkins testified if someone calls someone a scab it is a derogatory term. Adkins testified there was nothing on White’s truck that referred to subcontractors, and he did not interpret scab to be synonymous with subcontractor. However, the following ex-

<sup>7</sup> Lewis testified the Union has taken some steps to determine that the contractors at issue were not union. Lewis testified first of all it was common knowledge. Lewis testified in their district there are organizing meetings, and Lewis is a union organizer. Lewis testified one of the main topics is to try and organize GMS and Strata, which are the two contractors at issue.

change occurred:

THE HEARING OFFICER: Did you know who he was referring to when you read the sign?

THE WITNESS: I did not. I mean, I assumed it was contractors.

Q. What made you assume that?

A. The amount of grievance activity the union—the amount of protest that the union had made because of our use of subcontractors. All that was going on at the mine at the time.

Adkins testified he was concerned with what might happen if the sign remained visible in the parking lot. He testified, “I was concerned that there could be, you know, one, violence, and two, a work stoppage, a potential work stoppage or slowdown.” Adkins testified he thought contractors would see the sign. He testified, “I thought that if they see this, they would be ticked off and they wouldn’t want to come to work or we would have other members of the bargaining unit that see the sign and potentially go on strike.”

Adkins testified he met with White about the sign the same day Adkins first saw the sign. Adkins testified that, during his meeting with White and Lewis, Adkins told White if he wanted to display the signs, he would have to do it off company property. He testified he told White if he refused to take the signs down and he parked his vehicle on company property Adkins would have the vehicle towed. Adkins testified, “I also told him that I was concerned that this could be construed as a work stoppage or slowdown.” Adkins denied that White asked him if it was not his right of freedom of speech. Adkins testified the phrase freedom of speech never came up. Adkins testified, “Basically, when I told him that I didn’t want him parking on company property, he said he understood. You know, he just listened to what I had to say, and at the end, said ‘Okay’ and got up and left.” Adkins testified White raised no protest about it. Adkins testified he did not recall Lewis saying anything at the meeting. Adkins testified no one raised anything. They just said “Okay” and that was the end of it.

Adkins testified in response to a leading question, that he raised Respondent’s rules of conduct during the meeting. He testified, “I referred to employee conduct rule No. 11, ‘Picketing, instigating, participating or leading in an unauthorized work stoppage or slowdown.’” Adkins testified that rule 4 also applies pertaining to abusive and threatening language referring to the term scab. Adkins did not testify that he cited rule 4, during the meeting. Adkins testified when he met with White, White did not say the term scab applied to subcontractors. He testified the term subcontractor did not come up in the conversation. Adkins testified White did not tell Adkins what the reference to scab meant and Adkins did not ask him.

Adkins testified he only saw the truck with the sign on the day he had the conversation with White asking him to remove the vehicle. Adkins testified White was on afternoon shift that day. Adkins testified he saw the truck in the late afternoon. Adkins testified that after he finished talking to White then White returned to work to complete the remainder of his shift. Adkins testified he let White keep the truck on the lot for the remainder of his shift. Adkins testified he took a picture of

White’s truck following the meeting after White had returned to work. Adkins testified he consulted with the superintendent at the mine Richard Harris, who was in charge of the operations, before talking to White.

Adkins testified there was no violence at the mine caused by the sign, and to his knowledge there was no disruption of production. Adkins testified there was no strike, picket line, or work stoppage at the time of the incident with White’s truck. Adkins testified he did not receive any complaints from employees of subcontractors about the sign. Adkins testified he was not aware of any contractors at the mine that had union represented employees. He testified, “The subcontractors that we were using were not UMWA members.”

Adkins testified he consulted with Gregory Dixon, a labor consultant employed by Consol Energy, Inc. Adkins testified he spoke to Dixon after Adkins met with White and instructed White to remove the vehicle. Adkins testified he spoke to Dixon within a day after the meeting with White. Adkins does not report to Dixon. Adkins reports to the general superintendent at the mine. Dixon testified he provides advice to Consol’s coal mines on matters involving collective bargaining, and he represents the company in grievances at the arbitration level.

Dixon testified that in the 12 months prior to September 2007 there was significant grievance activity pertaining to subcontracting. He testified there were seven arbitrations during that period of time, and over 100 grievances that were resolved short of arbitration. Dixon was involved with six of the seven arbitrations. He testified the seven arbitrations were primarily repair and maintenance contracting cases and dealt with the prep plant. Dixon testified that, as to the arbitrations, one of the cases was sustained in part, but when you look at all seven cases, “in total, we pretty much prevailed in our position.” Dixon testified that the arbitration hearings were held in January, February, and March, and the last two decisions issued in July 2007. Dixon testified that he did not believe there were any pending arbitrations at the end of September 2007. Dixon testified the disputed work in the seven arbitration cases did not have anything to do with shoveling belt, setting post, or hanging or stringing pipe or water line.

Dixon testified there were probably some pending grievances at the end of September 2007. Dixon testified that most of those grievances ultimately got resolved, many of which were resolved in one meeting that Dixon did not attend. Dixon could not recall if the meeting was before or after September. He testified the Union withdrew the cases because they realized they were without merit after the Employer prevailed in the arbitrations. Dixon could not state whether the Employer paid backpay on any of the case, but stated the huge majority were withdrawn. Dixon testified that even after the meeting there have been some subcontracting grievances. Dixon did not know if the Employer paid any subcontracting grievances after the arbitrations. Dixon mainly handles grievances at the arbitration level. Dixon does not receive reports about every grievance that settles short of arbitration. He testified some could have settled and been paid that he was not aware of.

Dixon testified that Adkins called Dixon on September 24 or 25, and notified him that White had a sign on his truck in the company parking lot and he told Dixon the sign said something

to the effect that, "We don't want scabs." Dixon testified, "I can't really remember for sure whether Jason told me that he had already met with Cliff White concerning the sign or whether he said that he wanted or was planning on meeting with Cliff and wanted my input. I just can't remember." Dixon saw a picture of the truck with the sign, but he could not recall whether he saw the picture of the truck before or after his conversation with Adkins. Dixon testified Adkins e-mailed a copy of the picture to him. Dixon could not recall whether Adkins told him the content of the sign or he e-mailed him the picture as they were talking. Dixon testified, "I thought the sign was pretty inflammatory." He testified the term "scab" is pretty derogatory in my experience and that it means, "if there was an economic strike going on at a plant or a coal mine or something, if somebody chooses to cross the picket line and work in place of the strikers, you know, that's sort of a common understanding, as far as I am concerned." Dixon testified he did not consider the word scab synonymous with subcontractor. Dixon went on to testify as follows:

Q. And when you saw a picture or heard about that sign described to you, did the word subcontractor come to your mind?

A. I didn't—I really didn't know 100 percent what the purpose was.

THE HEARING OFFICER: Did you know what the dispute was about?

THE WITNESS: I thought the dispute on the contractors was behind us.

THE HEARING OFFICER: Did you know why he put the sign up?

THE WITNESS: I didn't know if, you know, we have had a history about—we had, at one point in time, illegal work stoppages or unauthorized work stoppages in the industry. That's well behind us.

THE HEARING OFFICER: How long ago was that?

THE WITNESS: When I started in the industry in 1976, it was very, very common.

THE HEARING OFFICER: When was the last time you were aware of one?

THE WITNESS: I am going to estimate maybe early '80s. It's pretty much behind us now, but I didn't know.

THE HEARING OFFICER: But you were told by Mr. Adkins that there was a term "scab" on the truck?

THE WITNESS: Right.

THE HEARING OFFICER: Did you ask him what it was about?

THE WITNESS: I can't remember exactly the nature of our conversation.

THE HEARING OFFICER: You don't know whether you asked him what it was about? I mean, a truck appears in the parking lot that says "scab" on it. You didn't ask him why? You weren't concerned?

THE WITNESS: I was very concerned.

THE HEARING OFFICER: You didn't ask him why he thought it was there?

THE WITNESS: I don't remember whether I did or not. As I said, I can't remember, sir, if he called and said—I

know that at one point in time or at a point in time, that Jason had told Mr. White that he wanted the sign removed. Again, I can't remember if Jason called and said "Greg, this is what I am thinking about telling Cliff. What do you think" or if he called and says "Look, I had a meeting with Cliff. This happened and I told him that we wanted the sign off."

THE HEARING OFFICER: Are you saying —

THE WITNESS: I may have asked him if there was anything going on that I didn't know about at the coal mine.

THE HEARING OFFICER: What did you think the sign was about?

THE WITNESS: I thought it could have been—again, I don't know if it had something to do with starting an illegal strike or if it was a remnant of the subcontracting dispute which, you know, it was pretty much behind us by that time. Now, you know, I mean the local was not happy that we had prevailed on that issue, so I thought maybe it was —

THE HEARING OFFICER: You never discussed with Mr. Adkins whether that was what it was about?

THE WITNESS: I can't swear to you today that he and I had a discussion exactly like you and I are having right this minute, no, sir.

THE HEARING OFFICER: You can't say you did or you can't say you didn't?

WITNESS: Correct.

Dixon then testified he was concerned about White's sign because it could have been a remnant of the dispute over subcontracting that been ongoing for a year. He testified in his experience "that's a very derogatory, inflammatory kind of comment." Dixon testified if it was directed toward some of the contractors there could have been a violent reaction, there could be property damage, a fist fight in the parking lot. Dixon testified, "I didn't see anything good coming out of it." Dixon testified Adkins did not tell him he assumed the signs referred to subcontractors. Dixon testified they had a backdrop of a history for at least a year of a lot of complaints or grievances concerning subcontracting. Dixon testified he concurred in Adkins' decision to tell White not to come back with a sign on his truck to prevent a potential problem.<sup>8</sup>

Dixon testified Adkins did not report that there had been property destruction, violence, or angry confrontations. Dixon testified if Adkins had e-mailed a picture that said, "We don't want subcontractors?" then Dixon's opinion about "the whole situation would have been different." Dixon testified, "My experience in the industry, I mean, contractors is not a derogatory harassing kind of term." Dixon testified as follows:

THE HEARING OFFICER: So if they used a sign "We don't want contractors," you wouldn't have agreed that it should be removed?

<sup>8</sup> Dixon testified he had become aware of the written protests Adkins had received from Sparks about contracting out, shoveling, setting timbers, and the performance of doing labor work. Dixon could not recall how his knowledge of the Sparks' complaint related to the timing of Dixon's September 24 or 25 phone call with Adkins about White.

THE WITNESS: I don't think the sign should have been removed.

### *B. Credibility*

The original charge in this case was filed on October 26, 2007, and it asserts that White was instructed to remove the sign on September 24. The amended charge is dated, January 28, 2008, but was not listed in the complaint as being filed by the Union until May 28, 2008. It asserts the day in question as to White being instructed to remove the sign was October 1, 2007, rather than September 24. The General Counsel's complaint asserts the incident took place on October 1. While Respondent specifically denied allegations pertaining to that complaint paragraph in its answer, it did not specifically dispute the October 1, date alleged in the complaint.

White testified with specificity, good recall, and in a credible fashion that he parked his vehicle with the signs on Respondent's lot on September 27 and 28, and October 1. He also testified he contacted Sparks and notified him when the signs were finished. I do not find it fortuitous that Sparks' written complaints to Respondent pertaining to some of the contracting at issue were also dated, September 27, the date White testified he initially posted the sign. Rather, I find the sign posting and Sparks' subcontracting complaints were part of a coordinated effort by the Union against Respondent's subcontracting of what they perceived to be bargaining unit work. Thus, I have credited White over Adkins and concluded White posted the sign on September 27 and 28, and October 1, and that Adkins first saw the sign on September 27, as White testified.<sup>9</sup>

Concerning the October 1, meeting, both White and Lewis credibly testified Adkins instructed White to remove the truck from the parking lot because of the signs, or have the truck towed at White's expense. They both testified White protested Adkins' directive as a violation of White's right to freedom of speech, and that Adkins rejected White's protest and wanted the truck removed. White was told he could bring the truck back after the signs were removed. White and Lewis credibly testified that was the extent of the discussion, with Lewis being called on rebuttal adding that Adkins did not cite any work rules or claim the signs caused any turmoil at the mine during the meeting.

On the other hand, I did not find Adkins' testimony particularly convincing. Adkins claimed he saw the vehicle in the afternoon of September 24, consulted the job superintendent, met with Lewis and White that same afternoon with a formu-

lated concern over the application of two of the Employer's work rules. He also testified he photographed the vehicle that same day. No documentation of any of his actions was presented showing the date of the occurrence. He testified he emailed the picture of the truck that same day or the next to Dixon, but the email that would have shown the date of the occurrence was not introduced into evidence. Adkins also testified he did not confer with Dixon until after Adkins met with White and instructed him to remove the vehicle. Adkins waiting until after the fact to consult with Dixon, makes no sense particularly since no explanation was given for the delay. This is particularly so, since according to Adkins he allowed White to complete his shift following their meeting, before White was required to move the vehicle.

Adkins impressed me as someone who, in the ordinary course of business, paid attention to detail. For example, Adkins did not respond to Sparks' September 27 complaints and information request concerning subcontracting until October 16, and Adkins was careful to specify in his written response that he had not received the complaints until September 28. Thus, I have concluded that Adkins, in the ordinary course of business, would have sought Dixon's advice before Adkins confronted White, leading me to believe that Adkins was aware the vehicle with the signs was on the property longer than he was willing to admit. Thus, I have concluded, as White credibly testified White first parked the truck with the signs on the Respondent's lot on September 27, that Adkins saw it on that date, but waited until October 1 before confronting White.

Considering the demeanor of the witnesses, and the evidence of the record as a whole, I have also credited White and Lewis' version of the October 1, meeting over that provided by Adkins. Given the fact, that the employees had discussed subcontracting at the September 16 union meeting, discussed the language of the signs, and come up a plan to post them in the Respondent's lot, that White went through the time and effort to have the signs made and mount them on his truck, and thereafter notify Sparks that they were complete, I find it highly unlikely White would have just agreed to remove the signs without voicing any protest as Adkins claimed. Rather, I find White did raise a first amendment argument during the meeting, which was rejected by Adkins. In these circumstances, I have also credited White and Lewis' consistent testimony that Adkins gave no explanation for the removal of the signs other than the fact that he wanted them removed from the Respondent's property.

I also did not find Dixon's testimony credible as to the timing and content of his conversation with Adkins concerning the signs on Whites' truck. Dixon's recall as to the event was poor. He testified his conversation with Adkins was either September 24 or 25, but gave no explanation of why he felt it was either date. Moreover, Dixon a labor consultant claimed he could not recall whether he spoke to Adkins before or after Adkins had instructed White to remove the sign. It would seem Dixon would have recalled if Adkins only sought his advice after the fact if that truly occurred. Moreover, Dixon equivocated as to whether he was aware of the subject of White's protest, but incredibly claimed he could not recall seeking clarification from Adkins during the call. In the face of Dixon's testimony

<sup>9</sup> Indeed, Adkins testified he assumed the term scab related to contractors, stating that the Union's protest of the use of contractors was going on at the time he confronted White over the sign. I did not find Dixon's testimony that he conversed with Adkins about the sign on September 24 or 25 to be very persuasive. Dixon gave no reason for selecting those dates and his testimony about the timing and content of his conversation with Adkins was hazy at best. In making the determination White had the signs in the lot for 3 days, I have also considered that no employee except White testified they were aware the truck was in the lot with the signs for more than one day. However, given the size of the unit, around 730 employees, and the size of the parking lot, I did not find this factor to be sufficient to discredit White's credible testimony as to the dates he had the signs in the lot.

that he was very concerned about the reaction to a sign with the term scabs on the Respondent's property, his failure to question Adkins about the cause of the protest simply does not make sense. Rather, I have concluded that both Adkins and Dixon knew what the protest was about, and that was subcontracting, as Adkins admitted. I have concluded that both Adkins and Dixon were aware that they had received Sparks' subcontracting complaints close in time to when White posted his signs, and that they were aware the term scabs on White's signs was a reference to the nonunion subcontractor employees. I find Dixon's ambiguous testimony on the subject was part of an effort to support Respondent's legal argument that White did not use the term "scabs" correctly on the signs since there was no strike and the subcontractors' employees had not crossed a picket line.

### C. Analysis

In *International Business Machines Corp.*, 333 NLRB 215, 219–221 (2001), enfd. 31 Fed. App. 744 (2d Cir. 2002), two employees placed signs on their vans in the employer's parking lot soliciting employees to support a union at IBM. One sign was 4 feet by 8 feet and the other was 2 feet by 4 feet. There the Board affirmed the judge's findings that the employer violated Section 8(a)(1) of the Act by informing the employees that the display of their signs contravened company policy, and they employer reserved the right to enforce that policy. In finding a violation, the judge noted that the display of signs, union insignia and other visual means of supporting a union fall within the category of solicitation. The judge, as approved by the Board stated the following:

In *Firestone Tire & Rubber Co.*, 238 NLRB 1323 (1978),<sup>[10]</sup> an employee and shop steward was told that he could only continue to use the company parking lot if he removed from his car, several large signs, one stating "Don't Buy Firestone Products." This parking lot was used primarily by company employees but also was used by visitors. When the individual refused to remove the signs, he was disciplined. The Board, citing the Supreme Court's decisions in *Eastex, Inc., v. NLRB*, 434 U.S. 1045 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 521 fn. 10 (1976); *NLRB v. Babcock & Wilcox Co.*, supra; and *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945), stated inter alia,

In an unbroken line of decisions, this Board and the Supreme Court have stated that where an employee exercises his Section 7 rights while legally on an employer's property pursuant to the employment relationship, the balance to be struck is not vis a vis the employer's property rights, but only vis a vis the employer's managerial rights. The difference is "one of substance," since in the latter situation Respondent's managerial rights prevail only where it can show that the restriction is necessary to maintain production or discipline or otherwise prevent the disruption of Respondent's operations....

The facts clearly reveal that but for the fact that the parking lot was located on Respondent's premises, Knight was clearly engaged in protected concerted activities. This Board has long held that actions taken in sympathy of other striking employees fall within the protection of Section 7 of the Act.

[T]he Administrative Law Judge cites *Cashway Lumber Inc.*, for the rule that an employee does not have a right to affix union posters on the employer's walls and property. However, this case is clearly distinguishable since *Cashway*, supra, stands only for the proposition that an employee is not engaged in protected activity if he defaces the employer's property. The mere presence of an automobile on which signs have been attached does not constitute the defacement of the property on which it has been parked.

.... This case does not present a situation analogous to *Southwestern Bell Telephone Co.* supra, where a message printed on shirts worn at work . . . was found to be "offensive, obscene or obnoxious," thereby justifying the employer's actions taken against employees who refused to remove them or cover them up. Here . . . the boycott signs were not taken into Respondent's work areas, did not interfere with Knight's ability to perform his assigned tasks, and did not otherwise interfere with Respondent's managerial rights. Here, the record clearly reveals that the parking lot was primarily used by employees not then at work and was an appropriate forum for communication among them. The fact that other persons not employed by Respondent may have had access to the parking lot and accordingly have had occasion to read these signs in insufficient reason for Respondent to be able to control an employee's exercise of his Section 7 rights.

In *Coors Container Co.*, 238 NLRB 1312, 1319 (1978),<sup>[11]</sup> employees of Coors during the course of an economic strike by other employees of a related company, showed their sympathy by placing signs in their vehicle windows stating: "Boycott Coors-Scab Beer." The company barred the display of such signs on its property. The administrative law judge rejected the company's contention that the signs were not protected under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), for allegedly disparaging the product of Coors. He also held, with Board approval, that the use of the signs was a legitimate form of solicitation which did not interfere with production or discipline. The Judge noted:

Here there is no showing of such special circumstances. Certainly none existed in the circumstances surrounding the display of the sign by Mugge and Clemente. The sign was displayed inside "Clemente's" truck. They were some distance away from any work location. There had been no incidents among Respondent's employees arising out of the strike, and, in any event, the wording of

<sup>10</sup> Case enforced at *Firestone Tire & Rubber v. NLRB*, 651 F.2d 1172 (6th Cir. 1980).

<sup>11</sup> Case enforced at *Coors Container Co. v. NLRB*, 628 F.2d 1283 (10th Cir. 1980).



the sign was not unduly provocative. The Board has long recognized that the term “scab” is not so opprobrious as to justify barring its use in the workplace.

As to the general prohibition against the display of boycott signs, no special circumstances were shown to exist anywhere on Respondent’s premises which would justify, in the interest of the maintenance of production and discipline, restricting the employee’s right to engage in such activity. I therefore find that the rule promulgated by Respondent prohibiting the display by employees of boycott signs was violative of Section 8(a)(1) of the Act. Similarly, Respondent violated the Act . . . in asking Mugge and Clemente to remove the sign . . .

See *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000), where it was held an employee’s use of the word scab while engaging in protected concerted activity when conversing with another employee “unaccompanied by any threat or physical gestures or contact,” “does not, in and of itself, deprive him of the protection of the Act. It follows therefore that the Respondent could not lawfully discipline Gould for use of that word and that the warning notice violated Section 8(a)(3) and (1) of the Act.” See also *Mead Corp.*, 314 NLRB 732 (1994), *enfd.* 73 F.3d 74 (6th Cir. 1996), where employees wearing “No scab” buttons to protest the employer’s flex program agreed to under a collective bargaining agreement was held to constitute protected concerted activity. The Board held the union’s signing of the contract did not waive of the right to protest its provisions. There was no on going strike or picket line in *Mead Corp.*, rather the union was protesting the employees’ participation in the employer’s flex program as a perceived encroachment on bargaining unit work. In *Machinists Lodge 91 v. NLRB*, 814 F.2d 876, 879 (2d Cir. 1987), the court found a company rule prohibiting large signs or banners on employee vehicles in company parking lots violated Section 8(a)(1) of the Act. The court stated, “Managerial rights decisions make clear that any restriction of employees’ on-premises communication in nonworking areas during nonworking hours ‘must be presumed to be an unreasonable impediment to self-organization—in the absence of evidence that special circumstances making the rule necessary.’” (Internal citations omitted.)

In the instant case, the Respondent operates an underground coal mine, with over 700 employees in the bargaining unit, working on three rotating shifts. The Union and the Respondent have had a longstanding dispute over Respondent’s subcontracting practices. During the period of January through September 2007, over 100 grievances were filed. Dixon’s credited testimony reveals that by June 2007, seven of those cases had gone to arbitration, with the Union being sustained on two, but one of those being reversed in a judicial proceeding, with the other cases being decided in favor of Respondent’s position. However, Dixon testified all of the arbitrations related to work performed at the prep plant. Dixon testified none of the arbitrations involved shoveling belt, setting post, or hanging or stringing pipe or water line, work which is currently in dispute with the parties and the subject of White’s protest.<sup>12</sup>

<sup>12</sup> None of the grievances, grievance settlements, or arbitration awards were submitted into evidence. I have credited Dixon’s testi-

Lewis, the president of the local union, testified the union has filed subcontracting grievances since the seven arbitration cases, and they settled a case as late a week before the trial herein taking place in October 2008, in which the Respondent paid backpay as part of the grievance settlement. White as a beltman traveled throughout the mine. He testified to witnessing an increase in subcontracting, and that the subcontractors began to shovel the belt, set posts, and working on waterlines, which White testified was theretofore bargaining unit work. White, as a union committeeman, met with supervisors Davis and Reynolds in June 2007, where he protested the employees of subcontractors performing bargaining unit work. White testified the Employer has settled grievances concerning setting posts and shoveling the belt, where the Employer has paid employees. He testified he testified each grievance he wrote about the disputed work, the Respondent would settle by paying the bargaining unit employees, but then continue to subcontract the work.

There was a union meeting on September 16, where the subject of contracting out came up. About 35 to 40 employees attended the meeting. During the course of the discussion, then Union President Sparks suggested signs be posted on employee vehicles parking in the Respondents parking lot protesting the subcontracting. Some of the suggested language included “We don’t want Scabs.” On September 27, Sparks signed two separate protest complaints over subcontracting addressed to HR Supervisor Adkins. One was over shoveling, setting timbers, and labor work, and the other over changing of belt rollers. Sparks made an information request to Adkins relating to subcontracting by letter dated the same date. Adkins responded to Sparks by letter dated October 16, acknowledging receipt of both letters of protest on September 28.

During this period, White had two large signs made up spanning the length of the bed of his pick up truck. The signs stated, “WE DON’T WANT SCABS.” White called Sparks to let him know the signs were finished. White was the only employee to place protest signs on his vehicle. White credibly testified he drove the truck to work with the signs on September 27 and 28 and October 1. White credibly testified that on September 27, White saw Adkins walk up to the truck and study the signs, and then leave. Both Lewis and White testified there was a lot of discussion amongst employees about the signs on White’s truck.

White testified, “My definition of a scab is it’s a union coal mine; it should be union work.” White testified he did not use the word scab to fire people up. He testified, “Nobody got fired up.” He stated, “Guarantee you, nobody got fired up, not even the contractor.” He testified no one was upset about the word. White testified he did not use the word to get people upset to take action. He testified, “There was no action being taken.”

White credibly testified that: On October 1, some of White’s coworkers told him Adkins was looking for him because of the signs on White’s truck. White went to Adkins’ office at the end

mony as to the timing and subject matter of the arbitration cases, as he was the only witness who handled cases at that level, and he had a better command of the timing and substance of the arbitrations than either White or Lewis.

of White's shift on October 1. Lewis, a mine committeeman, accompanied White. Adkins told White he wanted the signs removed from White's truck. Adkins told White he had to remove the truck from the parking lot because of the signs. White said, "It's a freedom of speech, ain't it?" Adkins responded he did not care about that, he wanted the truck removed. White said, "You mean to tell me I can't bring it back the next day?" Adkins said, "No. Take the signs off the truck, you can bring the truck back." White responded, "Okay." Adkins told White if he came back with the signs, the truck would be towed at White's expense. White testified that ended the meeting. Lewis corroborated White's version of the meeting, and testified further that Adkins never said the signs caused any turmoil at the mine, nor did Adkins cite any work rules. Lewis credibly testified the only reason Adkins gave for removing the signs was that it was private property and he wanted the vehicle removed.

The parties stipulated that the Respondent's parking lot is not visible from the road leading to the mine. White testified employees, management, employees of subcontractors, and people who bring materials in out of the mine park in the lot. White testified there was no strike or picket line going on at the facility at the time he put the sign on his truck.

White's display of the signs on his truck in Respondent's parking lot was clearly protected union activity as it arose out of a dispute between the Union and the Respondent over Respondent's use of subcontractors. There were multiple grievances filed, and Adkins in fact received a protest from Union President Sparks over the subcontracting on September 28, the day after Adkins first saw White's truck with the signs on the Respondent's lot. See, *International Business Machines Corp.*, 333 NLRB 215, 219-221 (2001), *enfd.* 31 Fed. App. 744 (2d Cir. 2002); *Firestone Tire & Rubber Co.*, 238 NLRB 1323 (1978), *enfd.* 651 F.2d 1172 (6th Cir. 1980); *Coors Container Co.*, 238 NLRB 1312, 1319 (1978), *enfd.* 628 F.2d 1283 (10th Cir. 1980); and *Machinists Lodge 91 v. NLRB*, 814 F.2d 876, 879 (2d Cir. 1987). I do not find Respondent's argument that the use of the term scabs in White's sign removes his conduct from the protection of the Act. The sign was posted on the lot for 3 days, and Respondent can cite no evidence of any reaction to the sign or any disruption of work. In fact, Respondent's officials admit there was no such activity. See *Business Machines Corp.*, *supra.*; *Coors Container Co.*, *supra.*; *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000); and *Mead Corp.*, 314 NLRB 732, (1994), *enfd.* 73 F.3d 74 (6th Cir. 1996).

Respondent contends White's use of the term scabs was improper since there was no strike or picket line and therefore the circumstances did not meet the accepted definition of the word's usage. Respondent argues that since the definition at its core involves a person who refuses to strike or take the place of a striking employee, Whites' use of the term was false and it was done to recklessly and designed to incite his fellow employees to take improper action against either Respondent or subcontractors or both. I do not find merit in Respondent's argument. White credibly testified he used the term scab to represent nonunion workers taking the work of union members. I do not find that definition so far a field from the formula Respondent prescribes to remove its usage from the protections of

the Act. I do not find that White, given the circumstances, including numerous grievances that were not resolving an on-going dispute concerning the alleged loss of bargaining unit work, to have used the term recklessly or in bad faith. In fact, White did not need to further define the term, because given the grievance background, Adkins testified he assumed it was a reference to subcontracting. I have also not found Dixon's testimony that he thought it might have referred to something other than subcontracting credible. The Board has also found the use of the word "scab" to be protected conduct when it is used as part of a labor dispute that does not involve replacing strikers. See *Mead Corp.*, *supra.* I find no reason to conclude that White was not acting in good faith when he applied the term to the dispute at issue herein.<sup>13</sup> Accordingly, I find that on October 1, 2007, Adkins violated Section 8(a)(1) of the Act when he threatened White with having his vehicle towed from Respondent's parking lot because White engaged in the protected activity of displaying signs using the terms "scabs" in support of the Union's position on subcontracting.

#### CONCLUSIONS OF LAW

1. By threatening employees with having their vehicle towed from Respondent's parking lot because the employees engaged in the protected activity of displaying signs stating "We Don't Want Scabs" in support of the Union's position on subcontracting the Respondent has violated Section 8(a)(1) of the Act.

2. The aforesaid violation affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

#### ORDER

The National Labor Relations Board orders that Respondent, McElroy Coal Company, with its office and place of business in Glen Easton, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with having their vehicles towed

<sup>13</sup> I do not find Respondent's citation to *Pizza Crust Co.*, 286 NLRB 490, 507 (1987), *enfd.* 862 F.2d 49 (3d Cir. 1988), requires a different result. There an employee was found to be lawfully suspended for leveling a charge of book fixing against his employer. An allegation which the judge concluded he appeared to have made up on the spot. In finding the conduct unprotected, the judge stated, "This reckless disregard of the truth transcends any action, such as name calling." I find labeling the contractors employees here was nothing more than a form a name calling by White traditionally used for non union employees who take the work of union members.

<sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

from its parking lot because employees engaged in the protected activity of displaying signs stating “We Don’t Want Scabs” on those vehicles in support of the United Mine Workers of America, Local 1638, AFL–CIO, CLC’s position on subcontracting.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Glen Easton, West Virginia facilities copies of the attached notice marked “Appendix.”<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2007.

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<sup>15</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with having your vehicles towed from our parking lot because you engage in the protected activity of displaying signs stating “We Don’t Want Scabs” on those vehicles in support of the United Mine Workers of America, Local 1638, AFL–CIO, CLC’s position on subcontracting.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

MCELROY COAL COMPANY